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No. 01-837

# In the Supreme Court of the United States

MARTIN F. SLONIMSKY, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether the custodian of the records of a defunct corporation may refuse to produce records in response to Internal Revenue Service summonses on the ground that the production would violate his Fifth Amendment privilege against self-incrimination.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is unreported. The opinion of the district court (Pet. App. 5a-10a) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on July 6, 2001. The petition for a writ of certiorari was filed on October 4, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

1. A Special Agent for the Internal Revenue Service is conducting an examination to determine the correct federal income tax liabilities of petitioner for 1995 through 1997 and to inquire into any offense that may

have occurred in connection with the administration or enforcement of the internal revenue laws. In the course of this investigation, the Special Agent issued three summonses to petitioner in his capacity as president, general partner and records custodian of two Florida corporations (National Business Research Co. and National Business Research Co., Ltd.). The summonses ordered petitioner to appear before the Special Agent and to produce for examination certain documents of those companies relevant to the investigation. Petitioner refused to appear, asserting his Fifth Amendment privilege against self-incrimination. Pet. App. 6a-7a.

2. The United States petitioned the district court to enforce the summonses. The government asserted that, under the "collective entity doctrine" set forth in *Braswell* v. *United States*, 487 U.S. 99 (1988), an individual may not invoke his Fifth Amendment privilege against self-incrimination to avoid producing corporate records that are in his custody, even if those records would prove personally incriminating to him. Petitioner contended, however, that the "collective entity doctrine" does not apply to this case because the corporations were dissolved before the summonses were issued. Relying on the decision of the Second Circuit in *In re Three Grand Jury Subpoenas Duces Tecum Dated January 29, 1999*, 191 F.3d 173 (1999), petitioner asserted that, as a former employee of the corporations, he was entitled to assert a Fifth Amendment privilege against producing the documents of the dissolved corporations.

The district court rejected petitioner's assertion of the privilege. The court noted that, in *In re Grand Jury Subpoena Dated November 12, 1991 (David L. Paul)*, 957 F.2d 807, 812 (1992), the Eleventh Circuit

held that "a custodian of corporate records continues to hold them in a representative capacity even after his employment is terminated." The district court therefore ordered the summonses enforced. Pet. App. 7a-10a.

3. The court of appeals affirmed. Pet. App. 1a-3a. The court reaffirmed its decision in *Paul* that an individual may not invoke his Fifth Amendment privilege against self-incrimination to avoid producing documents of a corporation that are in his custody, even if he is no longer an employee of the corporation. *Id.* at 2a-3a.

## ARGUMENT

The decision of the court of appeals is correct and, as applied to the facts of this case, does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. The Fifth Amendment privilege against self-incrimination "protects a person * * * against being incriminated by his own compelled testimonial communications." *Fisher* v. *United States*, 425 U.S. 391, 409 (1976). "The constitutional privilege against self-incrimination is essentially a personal one, applying only to natural individuals." *United States* v. *White*, 322 U.S. 694, 698 (1944); see *Bellis* v. *United States*, 417 U.S. 85, 90 (1974) ("the Fifth Amendment privilege is a purely personal one"); *Couch* v. *United States*, 409 U.S. 322, 327 (1973) ("By its very nature, the privilege is an intimate and personal one.").

It is well established that the privilege against self-incrimination does not apply to the records of artificial entities and that "an individual cannot rely upon the privilege to avoid producing the records of a collective entity which are in his possession in a representative capacity, even if these records might incriminate him

personally." *Bellis* v. *United States*, 417 U.S. at 88. See also *id.* at 99-100 ("it is the organizational character of the records and the representative aspect of petitioner's present possession of them which predominates over his belatedly discovered personal interest in them"); *United States* v. *White*, 322 U.S. 694, 699-701 (1944); *Wilson* v. *United States*, 221 U.S. 361, 384-385 (1911); *Dreier* v. *United States*, 221 U.S. 394, 400 (1911) ("By virtue of the fact that they were the documents of the corporation in his custody, and not his private papers, he was under obligation to produce them when called for by proper process."); *Hale* v. *Henkel*, 201 U.S. 43, 74-75 (1906). This "collective entity doctrine" applies even with respect to the records of a dissolved corporation, because dissolution does not change the essential character or nature of the records. *Bellis* v. *United States*, 417 U.S. at 96 n.3. See also *Grant* v. *United States*, 227 U.S. 74, 80 (1913); *Wheeler* v. *United States*, 226 U.S. 478, 490 (1913).

In *Braswell* v. *United States*, 487 U.S. 99 (1988), this Court explained that the president of a corporation could not use his personal Fifth Amendment privilege to avoid producing corporate records in his possession because (*id.* at 109-110):

> [f]rom *Wilson* forward, the Court has consistently recognized that the custodian of corporate or entity records holds those documents in a representative rather than a personal capacity. Artificial entities such as corporations may act only through their agents, *Bellis*, *supra*, at 90, and a custodian's assumption of his representative capacity leads to certain obligations, including the duty to produce corporate records on proper demand by the Government. Under those circumstances, the custo-

> dian's act of production is not deemed a personal act, but rather an act of the corporation. Any claim of Fifth Amendment privilege asserted by the agent would be tantamount to a claim of privilege by the corporation—which of course possesses no such privilege.

2. The Eleventh Circuit correctly applied these established principles in *In re Grand Jury Subpoena Dated November 12, 1991 (David L. Paul)*, 957 F.2d 807 (1992). Paul was the chairman of the board and chief executive officer of a bank before it was taken over by the Resolution Trust Corp. *Id.* at 809. He sought to invoke his personal Fifth Amendment privilege to avoid producing bank records he had copied before he was removed from his positions at the bank, on the ground that the act of producing those documents would incriminate him personally. *Id.* at 808-809. The court rejected Paul's claim of privilege because "[t]he law is clear that an individual may not invoke his personal Fifth Amendment privilege to avoid producing the documents of a collective entity that are in his custody, even if his production of those documents would prove personally incriminating." *Id.* at 809 (citing *Braswell* v. *United States*, *supra*).

The court in *Paul* refused to create an exception for officers who assumed custody of corporate documents during their employment, but who terminated their employment before the issuance of the subpoena. 957 F.2d at 810. The court held that corporate records are necessarily held only in a representative capacity. *Ibid.* See also *In re Grand Jury Witnesses*, 92 F.3d 710, 713 (8th Cir. 1996) ("For Fifth Amendment purposes, any corporate agent with possession, custody, or control of corporate records produces those records in a repre-

sentative capacity."). As the court concluded in *Paul*, a contrary "view of the Fifth Amendment would directly undermine *Braswell*, and would create an obvious haven for those who seek to frustrate the legitimate demands for the production of relevant corporate records made by a grand jury."[1] 957 F.2d at 810.

In the present case, the court of appeals correctly followed its decision in *Paul* and concluded that the corporate or partnership records possessed by petitioner continued to be held by him in a representative capacity even after dissolution. See also *Bellis* v. *United States*, 417 U.S. at 96 n.3 ("dissolution of the partnership does not afford [petitioner] any greater claim to the privilege than he would have if the firm were still active"); *In re Sealed Case (Government Records)*, 950 F.2d 736 (D.C. Cir. 1991).

3. Petitioner errs in claiming (Pet. 12-15) that the decision in this case conflicts with the decision of the Second Circuit in *In re Three Grand Jury Subpoenas Duces Tecum Dated January 29, 1999*, 191 F.3d 173 (1999).[2] In that case, subpoenas were issued to a corporation that had been engaged in illegal activities. Three officers who worked in the division where the wrongdoing took place thereupon terminated their employment. *Id.* at 174-175. Additional subpoenas were then issued to those former officers, who resisted on the ground that production of the records would

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[1] Thus, contrary to petitioner's assertion (Pet. 16), the public interest does not demand that a former officer of a defunct corporation be entitled to assert a Fifth Amendment privilege to resist production of incriminating corporate records.

[2] Petitioner also errs in relying (Pet. 9-10) on *United States* v. *Doe*, 465 U.S. 605, 617 (1984), and *Fisher* v. *United States*, 425 U.S. 391, 410 (1976). Those cases did not involve a claim of Fifth Amendment privilege raised with respect to corporate records.

incriminate them. *Id.* at 175. Since the individuals who asserted Fifth Amendment privileges had either resigned their corporate employment or had their employment terminated, the Second Circuit concluded that the "collective entity doctrine" was inapplicable. *Id.* at 177-181. The Second Circuit held that when an officer resigns, corporate records in his custody cease to be held in a representative capacity and begin to be held in a personal capacity. *Id.* at 179-181. See also *In re Grand Jury Proceedings*, 71 F.3d 723, 724 (9th Cir. 1995).

In the present case, however, petitioner has not alleged or proved that he resigned or was terminated as an employee or officer of the corporations whose records were summoned. Instead, he relies (Pet. 5, 14) solely on the dissolution of the two corporations to establish his status as a former employee. Under applicable Florida law, however, the dissolution of a corporation does not automatically terminate an officer's status as an agent of the corporation. A dissolved corporation in Florida continues its existence while its affairs are being wound up by the directors. See Fla. Stat. Ann. §§ 607.1405, 607.1421 (West 2001); *Kyle* v. *Stewart*, 360 F.2d 753, 758 (5th Cir. 1966); *Gould* v. *Brick*, 358 F.2d 437, 438-439 (5th Cir. 1966); *Mobil Oil Corp.* v. *Thoss*, 385 So.2d 726 (Fla. Dist. Ct. App. 1980). Petitioner therefore still holds the corporate records in a representative capacity. Even under the holding of the Second Circuit in *In re Three Grand Jury Subpoenas Duces Tecum Dated January 29, 1999*, petitioner is thus not entitled to assert a claim of Fifth Amendment privilege in this case.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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